

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re DIEGO D., a Person Coming Under  
the Juvenile Court Law.

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

MARGARITA D. et al.,

Defendants and Appellants.

B252334

(Los Angeles County  
Super. Ct. No. CK99608)

APPEAL from orders of the Superior Court of Los Angeles County, Carlos Vasquez, Judge. Affirmed in part; reversed in part.

Maureen L. Keaney, under appointment by the Court of Appeal, for  
Defendant and Appellant, Margarita D.

Christopher R. Booth, under appointment by the Court of Appeal, for  
Defendant and Appellant, Nicholas R.

John F. Krattli, County Counsel, Dawyn R. Harrison, Assistant County Counsel, and Jacklyn K. Louie, Deputy County Counsel, for Plaintiff and Respondent.

---

Appellants Margarita D. (Mother) and Nicholas R. (Father) appeal the juvenile court's jurisdictional findings asserting jurisdiction over their son, Diego D., under Welfare and Institutions Code section 300, subdivisions (a) and (b).<sup>1</sup> Mother contends the court's jurisdictional findings were not supported by substantial evidence. Father contends the court violated his due process rights by failing to hold the jurisdictional hearing in abeyance when neither he nor another witness was in the courtroom when the matter was called. We conclude substantial evidence did not support the court's finding that Mother violated a preexisting restraining order, and therefore modify the jurisdictional order to eliminate the reference to Mother and reverse the dispositional order as it pertains to Mother. In all other respects, we affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Mother and Father were involved in a relationship at the time of Diego's birth in August 2006. They separated in 2009.<sup>2</sup>

---

<sup>1</sup> Undesignated statutory references are to the Welfare and Institutions Code.

<sup>2</sup> Mother reported that Father had been abusive to her and had abused drugs and alcohol during their time together. In addition, she reported that he continued to be abusive during child custody exchanges: he allegedly called Mother names in front of Diego, and threatened to take the boy from her or to report her undocumented status to authorities. The court sustained no allegations pertaining to this alleged behavior.

*(Fn. continued on next page.)*

In April 2011, Mother obtained a three-year restraining order requiring Father to refrain from harassing, attacking, threatening, assaulting, and otherwise interfering with her and Diego, and to refrain from contacting her “[e]xcept for brief and peaceful contact as required for court-ordered visitation of children.” The order further stated that Father was not to enter Mother’s residence or be within 100 yards of it. Attached to the restraining order was a family court child custody and visitation order. It stated that the drop-off location for custody exchanges was to be at Mother’s residence, and that Father was not to enter her residence. According to Mother’s declaration in support of the restraining order, on or about March 2011 when Diego was four, two incidents of domestic violence had occurred in the boy’s presence. In the first incident, Father had gotten into Mother’s car and refused to leave, despite Mother’s request. He insulted her, swore at her, threatened her with deportation, and spat on her shoulders and hair. Diego cried and told Father to leave. In the second incident, Father followed Mother and Diego home in a separate car, and started shouting at Mother when they arrived. He grabbed Diego and pushed Mother away when she tried to retrieve him. Diego managed to escape and run into Mother’s home. Father forced his way inside, causing Diego to become fearful.

The family was referred to DCFS in May 2013, after Mother called police to report a new domestic violence incident. This incident began when Mother asked Father to pick up Diego from school. Father agreed. Mother assumed Father would take the boy to the paternal grandmother’s house, but when Mother arrived, Diego was not there.<sup>3</sup> After calling Father and driving around looking for him and

---

There had been a referral to the Department of Children and Family Services (DCFS) in March 2011 based on emotional abuse by Father. It was investigated and closed as inconclusive.

<sup>3</sup> Father lived next door to the paternal grandmother.

Diego for 30 or 40 minutes, she returned to the paternal grandmother's home and found them there. She tried to pack Diego's things to leave. Father became angry and started yelling and screaming profanities at Mother. He grabbed her, pushed her against a countertop, and choked her, all in the presence of Diego. Mother and Diego started crying. Father took Diego into another room to calm down. Shortly thereafter, he permitted Mother to take Diego home.

On their way home, Diego cried and blamed himself. He told Mother that Father had pressured him to reveal where he and Mother lived, which Mother had not wanted Father to know.<sup>4</sup> Mother reported the abuse to the police the next day.

Interviewed by the caseworker, Diego reported "[m]y dad grabbed my mom's neck."<sup>5</sup> He said that his grandmother had come into the kitchen and told Father to stop saying "bad words." He reported seeing Father spit on Mother on an earlier occasion. He denied ever being hit by Father. Father reported that Mother periodically asked him to pick up Diego on days that were not his scheduled visitation days. He said that on the day in question, he and Mother quarreled because he wanted her to allow the boy to finish eating before leaving the grandmother's home. Father said he grabbed Diego by the arm and kept him in his seat. He denied grabbing Mother or choking her. He said Mother had "wrestl[ed]" with him, and that he "might [have]" pushed her.<sup>6</sup> The caseworker interviewed the

---

<sup>4</sup> The record indicates Mother had moved three times between October 2009 and February 2011.

<sup>5</sup> The officers to whom Mother reported the incident observed and photographed red marks on her neck.

<sup>6</sup> Father denied drug use and submitted to an on-demand drug test, which was negative. He admitted an earlier conviction for driving under the influence. Although he told the caseworker he had stopped drinking alcohol, he was arrested for DUI on the eve of the jurisdictional hearing.

paternal grandmother, who denied seeing Father choke, grab or push Mother, or hearing him yell profanities.

Mother's family law attorney reported that Mother had sole legal and physical custody of Diego. Under the original visitation order, Father had visitation Saturdays from noon to 6:00 p.m. and Tuesdays from 4:00 to 6:00 p.m.<sup>7</sup>

DCFS filed a section 300 petition which included the allegation that "the child's parents violated the Family Law Court restraining order, by exchanging the child in the home of the paternal grandmother." The majority of the allegations of the petition pertained to Father. The petition alleged that Father "engaged in violent altercations with [Mother] in the child's presence"; "roughly grabbed [Mother's] wrist and side, and grabbed and choked [Mother] by the neck"; "pushed [Mother], causing [her] to fall backwards"; "hit [Mother's] back against [a] kitchen counter"; and in March 2011, spit on Mother's hair and shoulders and forcibly entered Mother's residence. At the May 2013 detention hearing, the court found a prima facie case for detaining Diego from Father. The court placed legal custody with DCFS, but released the boy to the care of Mother. Father was permitted monitored visitation.

Prior to the jurisdictional/dispositional hearing, Father was re-interviewed and again denied physically attacking Mother. He claimed to have "accidentally" spit on her face in 2011, while trying to get her to stop the car. Mother reported

---

<sup>7</sup> According to Mother's family law attorney, in September 2012, the family law court changed the visitation order at Mother's request, granting Mother permission to move to San Leandro. Visitations for Father after the move were to be for a week at a time during holidays and school breaks, and were to take place at the paternal grandmother's residence. The visits could take place at Father's residence only if the grandmother or an aunt were present. That order is not in the record. It does not appear that it ever took effect.

that she had enrolled Diego in therapy, and had enrolled herself in domestic violence classes, parenting classes and individual counseling.<sup>8</sup>

The jurisdictional/dispositional hearing took place on October 21, 2013. When the court called the matter, neither Father nor the paternal grandmother was present in the courtroom. Father's counsel asked that the matter be put over for a second call. The court stated that the matter had already been delayed for approximately 10 minutes, that the bailiff had been looking for Father "both on the floor and in the men's restroom" without success, and that the matter would have to go forward due to the court's heavy calendar. Another few minutes passed while counsel for the parties introduced their exhibits and counsel for DCFS, Mother and Diego announced they did not intend to call witnesses. Father and the paternal grandmother had still not appeared when the parties began oral argument.<sup>9</sup>

During oral argument, counsel for Mother contended that the allegations should be amended to state that Father violated the restraining order by his actions toward her, rather than that "the child's parents" violated the restraining order by exchanging Diego at the paternal grandmother's home. Counsel for DCFS and Diego argued in support of jurisdiction, focusing on the allegations concerning Father's physical abuse of Mother, and taking no position on the contention that Mother had violated the restraining order. Counsel for Father erroneously informed the court that the restraining order required Mother to drop off Diego at a

---

<sup>8</sup> Mother also reported that Diego had received therapy services approximately three years earlier to address the domestic abuse he had witnessed at that time. Prior to the jurisdictional hearing, Mother completed a parenting program, 19 individual counseling sessions, and more than a dozen group sessions for victims of domestic violence.

<sup>9</sup> Father returned to the courtroom during the argument of Diego's counsel. The court noted the time as 9:57 a.m. The hearing had been called for 8:30 a.m.. Father claimed to have been in the restroom.

police department, and contended Mother had violated the restraining order.<sup>10</sup> The court sustained the allegation that “the child’s parents violated the Family Law Court restraining order, by exchanging the child in the home of the paternal grandmother.” The court also sustained the allegations that Father “engaged in violent altercations with [Mother] in the child’s presence” by “roughly grabb[ing] [Mother’s] wrist and side, and grabb[ing] and chok[ing] [Mother] by the neck,” “push[ing] [Mother], causing [her] to fall backwards”; and “hit[ting] [Mother’s] back against [a] kitchen counter.” The court further found that Father had engaged in acts of domestic violence in the presence of Diego in March 2011, by spitting on Mother’s hair and shoulders and forcing his way into Mother’s residence.

Based on its factual findings, the court found jurisdiction appropriate under section 300, subdivisions (a) (serious physical harm) and (b) (failure to protect). The court found by clear and convincing evidence that there was substantial danger if Diego were to be returned to Father, and that there was no reasonable means of protecting the child without removing him from Father’s custody. The court allowed Mother to retain physical custody under the supervision of the court and DCFS. In the dispositional phase, Father was ordered to participate in a 26-week domestic violence counseling, and limited to monitored visits. The court noted that Mother had completed a parenting program and instructed her to complete a program of individual counseling geared toward victims of domestic violence.

On November 1, 2013, Father moved for reconsideration, seeking a hearing on the jurisdictional issues. His declaration stated that he had been prepared to testify that the allegations pled were “not accurate[],” that Mother had asked him to

---

<sup>10</sup> In fact, a requirement that the exchange take place at a police station had been written into a temporary restraining order (TRO) issued in March 2011. That TRO had been superseded by the April 2011 three-year restraining order, discussed above.

pick up Diego on the day of the incident and that he had been doing so regularly for the preceding two years, that Mother did not call the police until the day after the incident, and that there had been no charges filed against him based on violations of the restraining order. He stated that while waiting for the case to be called on the day of the hearing, he had gone to the cafeteria to get water and had stopped at a restroom on a different floor. He estimated he had been gone only 10 to 15 minutes. The court denied the motion, noting that counsel for Father did not know his whereabouts or if he had left the building, that the court had waited a significant period of time before proceeding with the hearing, that the bailiff had attempted to locate Father, and that additional time had passed on preliminary matters before Father appeared, much longer than the 10 to 15 minutes Father claimed to have been absent. Mother and Father appealed.

## **DISCUSSION**

### *A. Jurisdiction*

In order to assert jurisdiction over a minor, the juvenile court must find that he or she falls within one or more of the categories specified in section 300. (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 185.) DCFS bears the burden of proving by a preponderance of the evidence that the minor comes under the juvenile court's jurisdiction. (*Ibid.*) "We review the juvenile court's jurisdictional findings for sufficiency of the evidence. [Citations.] We review the record to determine whether there is any substantial evidence to support the juvenile court's conclusions, and we resolve all conflicts and make all reasonable inferences from the evidence to uphold the court's orders, if possible. [Citation.]" (*In re David M.* (2005) 134 Cal.App.4th 822, 828.) "We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or weigh the evidence." (*In re James R.* (2009) 176 Cal.App.4th 129, 135.)



Here, the court found jurisdiction appropriate under section 300, subdivision (a). A child is within the jurisdiction of the juvenile court under that subdivision if he or she “has suffered, or there is a substantial risk that [he or she] will suffer, serious physical harm inflicted nonaccidentally upon the child by the child’s parent or guardian.” Under the provisions of section 300, subdivision (a), “a court may find there is a substantial risk of serious future injury based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries on the child or the child’s siblings, or a combination of these and other actions by the parent or guardian which indicate the child is at risk of serious physical harm.”

The court also found jurisdiction appropriate under section 300, subdivision (b), which permits the court to adjudge a child a dependent of the juvenile court where “[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . .”

Mother contends substantial evidence did not support the court’s findings that jurisdiction was appropriate under either subdivision (a) or (b) of section 300.<sup>11</sup> We disagree. Numerous appellate courts have upheld the exercise of

---

<sup>11</sup> Respondent presented evidence that while the appeal was pending, the juvenile court terminated jurisdiction over Diego after issuing an exit order granting Mother sole legal and physical custody, and allowing Father monitored visitation only. Respondent moved to dismiss the appeal, contending the issues had been rendered moot. Appellate courts generally will reach the merits of a challenge to a jurisdictional order where the order “could be prejudicial to the appellant or could potentially impact the current or future dependency proceedings . . . .” (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762.) When the outcome of the appeal is the difference between the appellant’s “being an ‘offending’ parent versus a ‘non-offending’ parent[,] [the] distinction may have far-reaching implications with respect to future dependency proceedings in this case and [the appellant’s] parental rights.” (*Id.*, at p. 763; accord, *In re D.C.* (2011) 195 Cal.App.4th 1010, 1015.) Here, the court’s true finding with respect to Mother has given her the label of offending parent, and could be prejudicial in any future child dependency proceedings. The motion to dismiss is therefore denied.

dependency jurisdiction under subdivisions (a) and (b) based on a history of domestic violence between the parents where the evidence demonstrates a substantial risk of harm to the child involved. (See, e.g., *In re T.V.* (2013) 217 Cal.App.4th 126, 134; *In re R.C.* (2012) 210 Cal.App.4th 930, 941; *In re Daisy H.* (2011) 192 Cal.App.4th 713, 717; *In re Giovanni F.* (2010) 184 Cal.App.4th 594, 598-599; *In re E.B.* (2010) 184 Cal.App.4th 568, 576; *In re S.O.* (2002) 103 Cal.App.4th 453, 460-461; *In re Heather A.* (1996) 52 Cal.App.4th 183, 194.)<sup>12</sup> “Both common sense and expert opinion indicate spousal abuse is detrimental to children.” (*In re E.B.*, *supra*, at p. 576, quoting *In re Benjamin D.* (1991) 227 Cal.App.3d 1464, 1470, fn. 5.) “Studies show that violence by one parent against another harms children . . . .” (*In re E.B.*, *supra*, 184 Cal.App.4th at p. 576, quoting Fields, *The Impact of Spouse Abuse on Children and Its Relevance in Custody and Visitation Decisions in New York State* (1994) 3 Cornell J.L. & Pub. Pol’y 221, 228.) “First, children of these relationships appear more likely to

---

<sup>12</sup> The majority of courts have held that jurisdiction is appropriate under subdivision (b) of section 300 under the theory that domestic violence represents “neglect” and “failure to protect [the children] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it.” (*In re Heather A.*, *supra*, 52 Cal.App.4th at p. 194; accord, *In re T.V.*, *supra*, 217 Cal.App.4th at p. 135; *In re E.B.*, *supra*, 184 Cal.App.4th at p. 576; *In re S.O.*, *supra*, 103 Cal.App.4th at pp. 460-461.) The court in *In re Giovanni F.*, *supra*, 184 Cal.App.4th 598-601, found that jurisdiction was also appropriate under subdivision (a). We need not resolve whether *Giovanni F.* was incorrectly decided or distinguishable, as Mother contends in her brief. The subdivision (b) basis for jurisdiction would remain regardless of whether the juvenile court erred in finding jurisdiction appropriate under subdivision (a). (See *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 [“When a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court’s jurisdiction, a reviewing court can affirm the juvenile court’s finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence. In such a case, the reviewing court need not consider whether any or all of the other alleged statutory grounds for jurisdiction are supported by the evidence.”].)

experience physical harm from both parents than children of relationships without woman abuse. Second, even if they are not physically harmed, children suffer enormously from simply witnessing the violence between their parents . . . . [¶] Third, children of abusive fathers are likely to be physically abused themselves.” (In re E.B., *supra*, at p. 576, quoting Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions* (1991) 44 Vand. L.Rev. 1041, 1055-1056.)

Mother does not dispute that Father engaged in multiple acts of domestic abuse over the years culminating in the violent attack on her at the grandmother’s home in May 2013, during which he choked her hard enough to leave marks on her neck. Diego was present on all the occasions she reported. The violence he observed caused him to cry and become fearful, and to blame himself for its occurrence. Moreover, the evidence showed that Diego was drawn into the sphere where he could have been seriously injured by Father’s violent conduct. During the May 2013 incident, which occurred when Diego was six, Father grabbed him and forced him down when Mother tried to leave with him to go home. In 2011, when Diego was four, Father grabbed him and refused to let him go into his own home, compelling him to struggle to break free. Under these circumstances, the court could reasonably conclude that Father’s violence subjected Diego to a substantial risk of physical injury. (See *In re I.J.* (2013) 56 Cal.4th 766, 773 [“[S]ection 300 does not require that a child actually be abused or neglected before the juvenile court can assume jurisdiction. The subdivisions at issue here [including subdivision (b)] require only a ‘substantial risk’ that the child will be abused or neglected.”].) Based on this evidence, the court’s assertion of jurisdiction was amply supported.

We conclude, however, that substantial evidence did not support the court’s finding that jurisdiction was properly predicated on Mother’s supposed violation of

the April 2011 restraining order by exchanging Diego at the home of the paternal grandmother. The April 2011 order restrained Father from attacking and assaulting Mother and Diego, and prohibited Father from contacting Mother, except to peacefully exchange custody of Diego for visitation purposes. It did not restrain or prohibit Mother from doing anything. Respondent contends Mother violated the family law visitation order by asking Father to pick up Diego from school “in excess of the visitation laid out by the order” and by picking up Diego from the paternal grandmother’s residence, rather than having Father drop him off at her own. We do not view the family law order as imposing an upper limit on Father’s visitation with his son, but as requiring Mother to allow visitation, at a minimum, on the days and times set forth. Until DCFS and the juvenile court intervened, the parties were free to set up additional visitation on such schedules as they deemed appropriate.

It is true that the family law order specified the area outside Mother’s residence as the point of exchange. Assuming Mother’s decision to choose the grandmother’s residence for custody exchanges could be found to constitute a violation of the family court order, it was de minimis and does not warrant labeling Mother an offending parent for purposes of juvenile court jurisdiction. The record indicates that Father had regularly been picking up Diego from school and dropping him at the paternal grandmother’s residence for Mother to pick up later without incident. Mother’s decision to keep her residence confidential and to exchange Diego at a more neutral -- and potentially safer -- location than her home cannot support a finding that she failed to protect Diego or nonaccidentally caused the boy to suffer or be placed at risk of serious physical harm. Accordingly, we modify the jurisdictional order to strike the language stating that “the child’s parents violated the Family Law Court restraining order, by exchanging the child in the home of the paternal grandmother.” As this modification leaves no

jurisdictional findings pertaining to Mother, the portion of the dispositional order requiring Mother to participate in reunification services is reversed.

### *B. Father's Appeal*

Father contends the juvenile court violated his due process right to present evidence by failing to continue the matter when neither Father nor the paternal grandmother was present in the courtroom when the case was called.<sup>13</sup> Father contends this court's decision in *In re Hunter W.* (2011) 200 Cal.App.4th 1454 is on point and requires reversal. We disagree.

In *In re Hunter W.*, this court held that the juvenile court abused its discretion when it refused to continue a hearing on a section 388 petition to the afternoon calendar when the father was not available to testify because he had left the courthouse to obtain a signed letter from his treatment program to offer into evidence. The father had left at the advice of his counsel, who mistakenly believed the father would not be called to testify until the afternoon calendar. (*In re Hunter W.*, *supra*, 200 Cal.App.4th at p. 1460.) Here, Father left without advising his counsel where he was going or saying when or if he would return. The court did not proceed immediately when it discovered he was not in the courtroom, but sent the bailiff to look for him and delayed the matter for sufficient time for him to return from a bathroom break. Additional time passed while the parties addressed exhibits, but Father still did not appear. The court was not required to wait or further delay the hearing when it had no indication where Father was or when or if he would return.

---

<sup>13</sup> In response to respondent's motion to dismiss the appeal as moot, Father filed a letter submitting the matter to the court. We elect to resolve Father's appeal on the merits.

In any event, Father failed to show prejudice. Father stated in his declaration in support of the motion for reconsideration that he intended to testify that Mother had asked him to pick up Diego on the day of the incident and that he had been doing so regularly for the past two years, that Mother did not call the police until the day after the incident, and that there had been no charges filed against him based on violations of the restraining order. There was no dispute as to any of these facts. With respect to the attack on Mother, Father claimed his testimony would demonstrate that the allegations of the petition were “not accurate[.]” Father had been interviewed by the caseworker twice, and his version of events was in the record. He did not state in his declaration what he intended to add to the existing accounts. His partial denial of the attack on Mother was contradicted by Mother and Diego, as well as the photographs of Mother’s injuries taken by the police officers. Likewise, the paternal grandmother’s statement, in which she denied seeing Father attack Mother was already in the record.<sup>14</sup> There was no reasonable possibility that the outcome of the jurisdictional hearing would have changed had Father and the paternal grandmother testified.

---

<sup>14</sup> Both Mother and Diego had reported that the paternal grandmother was not in the room when the attack commenced.

## **DISPOSITION**

The court's jurisdictional order is modified by striking the finding that "the child's parents violated the Family Law Court restraining order, by exchanging the child in the home of the paternal grandmother." As modified, the jurisdictional order is affirmed. The court's dispositional order is reversed with respect to Mother. In all other respects, the dispositional order is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.